PAARI PERUMAL

v.

ABDUL MAJID HJ NAZARDIN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[CIVIL APPEAL NO: R2-11-71-99]
10 JULY 2000
[2000] CLJ JT(6)

LABOUR LAW: *Employment - Probationer - Whether deemed confirmed at end of probation period - Whether needs of society and social conditions necessitate probationer to be deemed confirmed - KC Mathews v. Kumpulan Guthrie Sdn Bhd - V Subramaniam & Ors v. Craigielea Estate*

LABOUR LAW: *Employment - Probationer - Probationary period expired but probationer not confirmed - Entitlement of annual leave only upon confirmation but probationer granted such leave - Whether amounted to confirmation*

LABOUR LAW: *Employment - Probationer - Issue of whether probationer confirmed - Whether register kept pursuant to s. 61 Employment Act 1955 relevant - Whether adverse inference ought to be drawn if employer fails to produce register - Whether allegation of poor performance can be entertained if not pleaded - Whether such allegation sustainable in the absence of warning letters - How should court deal with conflicting versions of events*

This was an appeal against the decision of the Magistrate's Court dismissing the plaintiff's claim for breach of contract. The plaintiff was employed by the defendants and the gist of his claim was that he was not paid the increment in salary due to him upon the expiry of his probation period. The plaintiff's letter of appointment stipulated that he was entitled to annual leave only upon confirmation but it was in evidence that he was granted annual leave. However, no confirmation letter was issued to the plaintiff. It also was in evidence that the defendants were waiting for the plaintiff to resign.

The magistrate dismissed the plaintiff's claim on the ground that the plaintiff was a probationer and therefore the defendants did not have to pay him the increment in salary. In so deciding, the magistrate took into account, *inter alia*, the following factors: (i) that the defendants were dissatisfied with the plaintiff's performance; (ii) that the failure of the defendants to produce the register kept by employers pursuant to s. 61 of

the Employment Act 1955 was not crucial because it was not relevant; and (iii) that the plaintiff had deceived the defendants into approving his annual leave.

Apart from the above, the court was also faced with the issue of whether an employee continues to be in service as a probationer upon the expiry of his probation period if no action has been taken by the employer to either confirm or terminate the services of the employee.

Held:

[1] In the instant case, it was evident that the leave granted was approved and stated as annual leave. The fact that the plaintiff was given annual leave proved that he was a confirmed employee.

[2] The magistrate erred when she accepted the evidence for the defendants that they were dissatisfied with the plaintiff's performance because nothing to this effect was included in the statement of defence. It was adduced for the first time during trial and thus should have been rejected. In any event, the absence of any warning letters for unsatisfactory performance supported the plaintiff's submission that the allegations regarding his poor performance were mere afterthoughts.

[3] The magistrate had fallen into error when she decided that the register kept by employers pursuant to s. 61 of the Employment Act 1955 was not relevant. If perused carefully, the different wage rates before and after the probation period entered in the register would certainly be evidence of confirmation and thus that document would have been relevant to determine if an employee was confirmed. In the instant case, the defendants failed to produce the register and this failure was not even explained. The irresistible inference would be that the register, if produced, would have been unfavourable to the defendants. Therefore, the magistrate erred when she failed to invoke s. 114(g) of the Evidence Act 1950 against the defendants.

[4] The magistrate should have asked herself whether it was inherently probable that the plaintiff had used the labour tactic of trapping the defendants by deceiving them into approving his annual leave. The magistrate should have also asked herself whether it was logical for the defendants to wait and hope for the plaintiff to resign without any reason to do so. Had she asked herself these questions, she would, upon a proper assessment of the totality of the evidence, have come to the conclusion that the defence story was wholly improbable.

[5] A probationer who is taken into permanent service should be advised of it by written notice served within one week of the completion of the probationary period. If the employee is not confirmed or his services are not terminated at the end of his probationary period, he should be deemed to be a confirmed employee. This will bring about certainty of status of employment to the employee and automatically the employee concerned will then be entitled to all the benefits that come with confirmation.

[6] Although the Federal Court cases of *KC Mathews v. Kumpulan Guthrie Sdn Bhd* and *V Subramaniam & Ors v. Craigielea Estate* which followed the Indian case of *Express Newspapers (P) Ltd v. Labour Court* are binding upon this court, this court is entitled to make its own decision without breaching the principle of *stare decisis.*

[6a] Due to the present climate of industrial relations and economic growth in Malaysia, this would be an appropriate occasion to consciously depart from the principle derived from the said Indian case on the ground that the needs of society and social conditions obtainable here in Malaysia are totally different from those of India then. Moreover, s. 3 of the Civil Law Act 1956 provides that the common law of England and rules of equity shall be applied only in so far as circumstances of the states of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary. There is a need today in Malaysia for the court to adopt a proactive stand in order to create a win-win situation for both employers and employees as they are the pillars of the country's economic and social developments.

[Appeal allowed; order accordingly.]

Case(s) referred to:

Chan Yoke Lain (administrator of the estate of Chong Yoke Fah, deceased) v. Pacific & Orient Insurance Co Sdn Bhd [1999] 1 CLJ 179 ***(refd)***

Chiu Wing Wa v. Ong Beng Cheng [1994] 1 CLJ 313 ***(refd)***

Craigielea Estate & 4 Employees, Award 15 of 1975 ***(refd)***

Express Newspapers (P) Ltd v. Labour Court [1964] AIR 806 ***(not foll)***

Healthcare Medical Screening Centre (M) Sdn Bhd v. Raymund Dominic Ignatius Louis [1997] 3 ILR 879 ***(foll)***

Kanagasabai Satkuru v. United Malayan Banking Corporation Bhd [1981] 2 MLJ 23 ***(refd)***

KC Mathews v. Kumpulan Guthrie Sdn Bhd [1981] 2 MLJ 320 ***(not foll)***

Lum Sow Kuen v. Chuah Choong Heong & Ors [1998] 4 CLJ Supp 161 ***(refd)***

R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 ***(refd)***

Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 ***(refd)***
Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors & Other Appeals [1997] 2 CLJ 607 ***(refd)***
Trio-Kenwood Electronics Engineering (M) Sdn Bhd v. Syed Ahmed Syed Mohsin [1996] 2 ILR 669 ***(foll)***
V Subramaniam & Ors v. Craigielea Estate [1982] 1 MLJ 317 ***(not foll)***

Legislation referred to:
Civil Law Act 1956, s. 3
Employment Act 1955, s. 61
Employment Regulations 1957, s. 5(b)(3), (c)
Evidence Act 1950, s. 114(g)

Other source referred to:
Archaism in the Courts, GH Walters, November 1977, p lxxiv

Appellant in person
For the respondent - Faradina Abu Bakar; M/s Akbardin & Co

Reported by S Dharmendran

JUDGMENT

Faiza Tamby Chik J:

The claim at the Magistrate's Court was *inter alia* for damages for breach of contract due to the defendants failure to pay the increment of RM100 after the end of the probation on 30 April 1994 (see statememt of claim at p. 7 Rekod Rayuan.) The learned magistrate dismissed the claim with costs. The learned magistrate dismissed the claim on the ground that the plaintiff was a probationer and therefore the respondents need not pay him the increment in salary of RM100 commencing May 1994. The Magistrate's Court found only one issue to be determined ie, whether or not the plaintiff was a confirmed staff of the defendants. (See grounds of judgment at p. 108 Rekod Rayuan, at line 2 "Isu di dalam kes ini adalah samada plaintif telah disahkan di dalam jawatan atau tidak". Again at line 9 of p. 111 Rekod Rayuan, the learned magisrate says "Isu dalam kes ini adalah samada plaintif telah disahkan atau tidak".)

The salient points of the case are that the defendants carry on a legal practice in the name and style of Messrs. Majid & Chen with a branch in Kuala Lumpur. The plaintiff commenced employment with the defendants as a litigation clerk on 2 February 1994 at a salary of RM1,100 per month. The probation period was three months. The plaintiff was entitled to annual leave provided his position was confirmed. He was given annual leave. He was not paid RM100 increment. He was not issued with any warning letters while in the defendants' employment. He left the defendants' employment at the end of January 1995.

The letter of appointment is at p. 22 Rekod Rayuan which stipulated that the probation period was for three (3) months and that the plaintiff was entitled to annual leave only as a confirmed employee. He conmenced employment on 2 February 1994. The three (3) months' probation period ended on 30 April 1994. Pages 24 to 31 Rekod Rayuan are agreed documents whereby the plaintiff's leave were approved and granted according to the letter of appointment (see p. 22 Rekod Rayuan). DW admitted them in his testimony.

The defendants contended that the said leave were given upon humanitarian grounds and therefore were not to be taken as annual leave. The plaintiff contended that all the leave were granted in accordance with his letter of appointment. The plaintiff further contended that if the defendants really wanted to give him the leave on humanitarian grounds and not as annual leave, they could and should have stated so on all his leave application forms. At pp. 27 and 30 of the Rekod Rayuan it is evident that the leave were approved and stated as annual leave only. It is clear that the granting of annual leave proved that the plaintiff was a confirmed employee. In *Healthcare Medical Screening Centre (M) Sdn. Bhd. v. Raymund Dominic Ignatius Louis* [1997] 3 ILR 879 the Industrial Court held:

> The fact that the claimant had paid a commission instead of a training allowance in April shows that he had been confirmed. This substantiated his contention that the payment of the commission begins on the ending of the probationary period with the stopping of the training allowance. The company had paid the claimant one month's salary instead of a pro-rated weekly sum as compensation *in lieu* of the notice and points to a confirmation.

In *Trio-Kenwood Electronics Engineering (M) Sdn. Bhd. v. Syed Ahmed Syed Mohsin* [1996] 2 ILR 669, the Industrial Court stated at pp. 674-675:

> The claimant was on probation as stated earlier but before the end of his probationary period he was given RM300 as merit increment. In *Oxford Advanced Learner's Dictionary of Current English,* "Merit" means:
>
> > Quality of fact of deserving well, worth, excellence ... quality, fact, action etc., that deserves reward.
>
> Therefore it was not at all convincing as said by the company that the claimant was given merit increment effective 1 July 1994 due to the fact that other managers in other companies in similar positions received more or because of market condition. It was the court's opinion that merit increment was given because the company was satisfied with the claimant's work and there was no evidence from the company that it had ever complained of his performance. If the company wanted to give the claimant

for other purpose such as bonus which was at the discretion of the company or for other useful purpose why did the company use the word 'merit increment'. There were other methods for the company to use. From *Employment, Its Terms and Conditions* by BR Ghaiye and Mrs. Nirmala Malhotra, it was said:

> When increment was given which was not ordinarily given till a person satisfactorily completed the probation period then he is deemed to have been confirmed on expiry of the period of probation if he is not discharged.

At the end of his probation of three (3) months the claimant was not discharged and as such it is the Court's opinion that the claimant was confirmed in his employment and therefore regarded as a confirmed employee when he was dismissed. This was fortified that when he was dismissed he was paid two months salary instead of two (2) weeks if considered on probation as provided in his employment letter dated 8 March 1994 p. 4 in CO1 which stated:

> **Termination**
>
> During the probation or extended probation period, a two (2) weeks' notice shall be given by the employee or the company without giving any reason. Upon confirmation, either party shall give two (2) months' notice or salary *in lieu* of notice without any reason.

The company told the Court that it was on sympathetic grounds why it gave two (2) months' salary. If this was so why the company did not give one (1) month or three (3) or four (4) months and why two (2) months which conformed to the provision in the said letter of appointment as a confirmed employee. It was considered that the company had already treated the claimant as a confirmed employee but later as an afterthought said otherwise on sympathy.

In both these cases, the employers gave the employee some benefit which they were only entitled to after being confirmed. These benefits when given meant the employees have been treated as confirmed. Therefore, giving the plaintiff the annual leave proved that he was a confirmed employee.

The learned magistrate in the instant case had taken into consideration DW's evidence in respect of matters not pleaded in the statement of defence. Reference is made to the last paragraph at p. 109 Rekod Rayuan. The learned magistrate erred when she accepted the evidence of DW ie, "SD tidak pernah sekali-kali mengesahkan plaintif di dalam jawatan beliau kerana tidak berpuashati dengan prestasi kerja plaintif." Reference is made to the statement of defence at p. 15 Rekod Rayuan when upon perusal, it is clearly a defence of bare denial. The fact that the defendants were

dissatisfied with the plaintiff's performance was no where to be found in the defence. It was adduced for the first time during trial. This evidence should have been rejected by the learned magistrate. In a Federal Court case of *Kanagasabai Satkuru v. United Malayan Banking Corporation Berhad* [1981] 2 MLJ 23 at p. 24 Tun Abdul Hamid FJ (as he then was) said:

> First and foremost the question that must necessarily be considered is whether the question raised by the appellant was an issue disclosed by the pleadings. It is a cardinal principle of law that a judge is bound to decide a case on the issues on the record. (See *Hj Mohd Dom v. Sakiman*).
>
> The question therefore is whether the appellant specifically and distinctly pleaded in his statement of defence the point which he now desires to raise.

It was not disputed that the plaintiff was not issued with any warning letters stating his performance was unsatisfactory. He conmenced employment on 2 February 1994 and left at the end of January 1995. There were all in 12 months. It is observed that in those 12 months of employment, he did not receive any letters warning him of any purported unsatisfactory performance. The absence of warning letters support the plaintiff's submission that these allegations regarding his poor and unsatisfactory performance were mere afterthoughts" of the defendants.

The learned magistrate decided that the register kept by the employer pursuant to s. 61 of the Employment Act 1955 was not relevant (see last paragraph at p. 111 Rekod Rayuan). Obviously the learned magistrate had fallen into error. Section 5 of the Employment Regulations 1957 refers to the register to be kept by every employer. Section 5(b)(3) mentioned of wage rates and s. 5(c) mentioned of details of wages and allowances earned during each wage period and the particulars under para. (c) shall be brought up to date in the register. If perused carefully, the different wage rates before and after the probation period entered in the register would certainly be evidence of confirmation. Thus, I am of the opinion that the register was proven to be relevant to the issue of determining if any employee was confirmed. It is observed that during trial, DW failed to produce the employees' register adverted to earlier. During cross examination at p. 81 Rekod Rayuan, DW answered that he did not bring it to court. DW further failed to give any explanation as to his failure to do so. DW's failure to produce to court the register in the possession of the defendants ought to have triggered the raising of adverse inference against the defendants pursuant to s. 114(g) of the Evidence Act 1950. What were the defendants afraid of? The irresistible inference would be that the register if produced would be unfavourable to the defendants. The learned magistrate had erred when she failed to invoke s. 114(g) of the Evidence Act 1950. In *Chan*

Yoke Lain (adminstrator of the estate of Chong Yoke Fah, deceased) v. Pacific & Orient Insurance Co. Sdn. Bhd. [1999] 1 MLJ 303 the Court of Appeal held:

> (2) The presence of David Lim or his clerk who filled up the proposal forms would have cleared all doubt about the alleged non-signature of the deceased on D2. Not only was David Lim or his clerk not called, neither was any explanation given by the respondent company as to the non-availability of David Lim or his clerk. The irresistible inference would be that if David Lim or his clerk were called, their evidence would be unfavourable to the respondent. The judge had erred when he declined to consider and invoke s. 114(g) of the Evidence Act 1950 (see pp. 308F-h and 309D).

The learned magistrate had presumed the plaintiff's application for annual leave was a labour tactic to defeat the defendants by trapping them (see p. 110 Rekod Rayuan). The learned magistrate failed to appreciate the fact that the defendants are practising lawyers. What is the probability of the plaintiff trapping and defeating the defendants who have legal training and learned in law? The learned magistrate also failed to consider the evidence of DW himself when he admitted at p. 86 Rekod Rayuan that the defendants were waiting for the plaintiff to resign. Why wait for the plaintiff to resign? Why did they not terminate his services if he was still on probation? In all probabilities the answer is that the defendants did not have any valid reasons to terminate the plaintiff's service as he was already confirmed. So the defendants employed the tactic of not paying his salary increment of RM100 per month in order to force his resignation.

In the Court of Appeal case of *Sivalingam a/l Periasamy v. Periasamy & Anor*. [1995] 3 MLJ 395 the court stated at pp. 398-399:

> Compelled to choose between these two conflicting versions, the learned trial judge preferred Samy's version and found that the plaintiff, in defiance of orders, had voluntarily climbed the tree on his own accord and was therefore not entitled to recover.
>
> We are fully conscious that this is an appeal that turns upon a question of fact. However, a careful reading of the trial judge's judgment shows that the process of reasoning adopted by him for preferring the evidence of the defence witnesses is based upon a wrong premise and does not accord with a well-settled principle that goes to form the fulcrum upon which the scales of procedural justice turn.
>
> First, the trial judge appears to have completely overlooked the inherent probabilities of the case. Evidence was led to prove that the plaintiff was a person who had a history of following orders given to him by those who held him in their custody, including the first respondent. Indeed the plaintiff

testified, without challenge, of the dire consequences that would ensure from disobedience. All this evidence was entirely accepted by the defendants. Yet, the defendants' case was that on this occasion the plaintiff had wilfully disobeyed an express order given to him. The question which the trial judge ought to have asked himself is whether it was inherently probable that the plaintiff, on this isolated instance, would have dared disobey an express order given to him not to climb the tree. Had he done so, he would, upon a proper assessment of the totality of the evidence, have come to the conclusion that the defence story was wholly improbable.

So, here we have a case where there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him. And of the principles that should govern such a case as the present there is no doubt.

It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

In the case such as this where the task of the court is to determine where the probable truth of the case lies, one can do no better than to recall to mind the words of Viscount Simon (who was in the majority) in *The 'Eurymedon'* [1942] 73 Lloyd LR 217:

The appellants, therefore, start in this House under the considerable handicap that there are concurrent findings of fact against them. (Which, we hasten to add, is not the case here.) I am far from saying that in these circumstances the House has no jurisdiction to allow the appeal, but it would need very clear and convincing reasoning to justify us in overthrowing what has already been decided. If it could be shown that the course of events affirmed by the learned judge could not have occurred, that would be an excellent reason for reversing his view – in these mundane happenings there is no conclusive argument than *non est credendum quia* impossible. If the impeached decision were shown to be an unwarranted deduction based on faulty judicial reasoning from admitted or established facts, that might lead to its reversal.

If there were so overwhelming a body of valid testimony for the view that has been rejected that a reasonable man would feel bound to accept it, the appeal would succeed.

The question which the learned magistrate should have asked herself was whether it was inherently probable that the plaintiff had used the labour tactic of trapping the defendants by deceiving them into giving him the annual leave. The learned magistrate further should have asked herself

whether it was logical for the defendants to wait and hope for the plaintiff to resign without any reason to do so. The right to livelihood is a right guaranteed by the Federal Constitution. Had the learned magistrate asked herself the above questions, she would, upon a proper assessment of the totality of the evidence, have come to the conclusion that the defence story was wholly improbable.

It is noteworthy that on p. 57 of the Rekod Rayuan from para. 18 to para. 24 the plaintiff had given extensive evidence as to damages suffered by him. It is observed that on p. 73 Rekod Rayuan the defendants had not challenged this piece of evidence during his cross-examination. Therefore it must be accepted as trite that failure to cross-examine the plaintiff on this piece of evidence must be treated as acceptance of this part of the plaintiff's evidence by the defendants. In *Lum Sow Kuen v. Chuah Choong Heong & 3 Ors.* [1998] 4 AMR 3518 Kamalanathan Ratnam J said at p. 3531:

> The rule in *Browne v. Dunn* has been explained by Mukharji in *Carapiet v. Derderian* AIR [1961] Cal 359 at p. 363:
>
> > The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witness in turn, so much of his own case which concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.
>
> This principle has been accepted by our Court of Appeal in *Aik Ming (M) Sdn Bhd v. Chang Chin Chuen* [1995] 3 AMR 2375 at 2406-2407 and in *Sivalingam v. Periasamy* [1996] 3 AMR 3507 at 3513.

In the circumstances of the instant case and for the foregoing reasons, I allow the appeal with cost and order the defendants to pay damages to the plaintiff as follows: Increment of RM100 per month for nine months from May 1994 to January 1995 amounting to RM900 ie, from date of confirmation (1 May 1994) to date of leaving employment. Salary of RM1,200 per month for the month of February and March of 1995 and RM700 per month from April 1995 to May 1996 amounting to RM12,200 (after taking into account of RM500 per month in mitigation). The plaintiff found a full time job in June 1996.

I would like to make an important observation here. This appeal brings out a very important point of law with regard to the principle of probation due to its significance to employees generally in this country. The main issue here is not a security of tenure but rather the status of the employee after passing the date of probation ie, the employee continuing to be a probationer as opposed to being confirmed. The law on probation in Malaysia as it stands today is as stated by the Indian case of *Express Newspapers (P) Ltd. v. Labour Court* [1964] AIR 806 (SC) which held:

> An employee appointed on probation for six months continues as a probationer even after the period of six months if at the end of the period his services had either not been terminated or he is confirmed. Without anything more an appointment on probation for six months gives the employer no right to terminate the service of an employee before six months had expired – except on the ground of misconduct or other sufficient reasons in which case even the services of a permanent employee could be terminated. At the end of the six months period the employer can either confirm him or terminate his services, because his service is found unsatisfactory. If no action is taken by the employer either by way of confirmation or by way of termination, the employee continues to be in service as a probationer. There cannot be automatic termination of services of the employee after the expiry of the period of six months.

This case was followed by our Federal Court in the cases of *KC Mathews v. Kumpulan Guthrie Sdn. Bhd.* [1981] 2 MLJ 320 (FC) and *V Subramaniam & Ors. v. Craigielea Estate* [1982] 1 MLJ 317 (FC). In *KC Mathews* the Federal Court held:

> In so far as his claim of confirmed service was concerned, counsel for the respondent relied on the following passage from the judgment of Das Gupta J, in *Express Newspapers Ltd. v. Labour Court & Anor:*
>
> > This contention is, in our opinion, wholly unsound. There can, in our opinion, be no doubt about the position in law that an employee appointed on probation for six months continues as a probationer even after the period of six months if at the end of the period his services had either not been terminated or he is confirmed. It appears

> clear to us that without anything more an appointment on probation for six months gives the employer no right to terminate the service of an employee before six months had expired – except on the ground of misconduct or other sufficient reasons in which case even the services of a permanent employee could be terminated. At the end of the six months period the employer can either confirm him or terminate his services, because his service is found unsatisfactory. If no action is taken by the employer either by way of confirmation or by way of termination, the employee continues to be in service as a probationer.

With respect, we agree.

For these reasons we dismissed the appeal with costs.

Appeal dismissed.

In *V. Subramaniam & Ors.* the Federal Court said:

> On the first subsidiary issue the Industrial Court was of the opinion that a probationer who at the end of his probationary period has not been confirmed or told to go must be regarded as having been admitted into permanent service, following its own earlier decision in Award 4 of 1970 (presided over by the late Mr. Maclntyre). In our judgment this was erroneous, for as was stated by the Indian Supreme Court at page 807 in *Express Newspapers (P) Ltd. v. Labour Court:*
>
> > There can, in our opinion, be no doubt about the position in law that an employee appointed on probation for six months continues as a probationer even after the period of six months if at the end of the period his services had neither been terminated or confirmed.

The point of contention here is if no action has been taken by way of confirmation or by way of termination at the end of the first probationary period, the employee continues to be in service as a probationer. This is the offending principle. I am of the view that the offending principle is neither supported by case law nor by logical reasoning. It is of interest to note that in the Industrial Court Award No. 15/75 *(Craigielea Estate & 4 Employees)* the court said:

> 7.3 We think the continuance in employment of a probationer after the completion of the probationary period is by itself sufficient notice of induction into permanent service; and the right of a probationer to join a Union is not negotiable since he is a workman within the meaning of the provisions of the Act.
>
> The Court is aware of the fact that neither of the above is a binding precedent but certainly more regard must be had to the views of the learned President, sitting here and making an award in the context of conditions peculiar to this country. Also, it appears to be a more logical conclusion

to me too. The Court thinks it is incumbent on the Estate to inform the trainee, at the end of the training period, as to whether his appointment has become permanent and, if not, to give him notice of termination so that he can seek employment elsewhere, perhaps in other fields. On the reasoning of the above Indian decision, there would be an indefinite period of probation after the due date of confirmation had elapsed which, the Court thinks, may not be fair to the probationer who should know exactly where he stands. The Court agrees, therefore, with the finding of the learned President in Award No. 4/70.

But in Award No. 4/70 made in Industrial Court Case No. 15 of 1968, the learned President had this to say:

7.2. The compromise, however, does not appear to cover two issues raised by virtue of the Union's claim that a probationer who is taken into the permanent service should be advised of it by written notice served within one week of the completion of the probationary period; and by virtue of the Company's assumption that a probationer is exempted from the scope of Union representation.

I am of the opinion that the security of tenure of a worker is of vital importance because of the worker's role in national development. A happy employee is a satisfied worker. A satisfied worker is one who knows exactly when his probation period is on trial and when he is confirmed. Languishing an employee as a probationer for an indefinite period does nobody any good. It is not productive for the employer nor for the employee himself. It is in this light that the offending principle is no longer in keeping with national aspiration and development if our nation is to aspire to achieve the status of an industrialised nation by the year 2020. Industrial harmony is a prerequisite. Only with security and continuity of employment will there be increased productivity. A probationer who is taken into the permanent service should be advised of it by written notice served within one week of the completion of the probationary period. But if the employee is neither confirmed nor terminated at the end of his probationary period, he should be deemed to be a confirmed employee. This will bring about certainty of status of employment to the employee. And automatically the employee concerned will then be entitled to all the benefits that come along with confirmation. This will definitely bring about increased productivity as an employee is a happy and satisfied person. Further, employees will not easily fall prey to unscrupulous employers who keep their employees languishing in the probation period and avoiding the need to give them the benefits which they will have to give if they are confirmed.

Before I conclude there is another observation. I am mindful of the fact that the two Federal Court cases are binding upon this court. Nevertheless with respect I am of the opinion that this court is entitled to make its own decision without breaching the principle of *stare decisis.* In the Supreme Court case of *Chiu Wing Wa @ Chew Weng Wah & 3 Ors. v. Ong Beng Cheng* [1994] 1 CLJ 313 at p. 319, Haji Mohd. Azmi bin Dato' Haji Kamaruddin SCJ said:

> ... Without any intention of undermining the principle of *stare decisis* as laid down by Lord Scarman in *Duport Steel Ltd. v. Sirs* [1980] 1 529 at 551(C), it is important that decided cases should not be followed blindly. As stated by Lord Halbury in *Quinn v. Leathem* [1901] AC 495 at 506:
>
> > Every judgment must be read as applicable to the particular facts proved, since the generality of expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are found.

In the Federal Court case of *R. Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, at p. 184 Eusoff Chin, Chief Justice said:

> Employers can certainly afford to employ a number of lawyers and prolong litigation and thereby tiring out the workers. The poor workman can ill afford a lawyer or prolong litigation because this will lead to inmense hardship, suffering and exorbitant expenses. In a classic judgment in *Bharat Singh v. New Delhi Tuberculosis Centre* [1986] 25 CC 614 at p. 619; AIR [1986] SC 842, the Indian Supreme Court held:
>
> > Instances are legend where workmen have been dragged by Employers in endless litigation with preliminary objections and other technical pleas to tire them out. A fight between a workman and his employer is often times an unequal fight. The legislature was thus aware that because of the long pendency of disputes in tribunals and courts, on account of the dilatory tactics adopted by the Employer, workmen had suffered.
>
> Our Parliament must have been aware of this problem and had especially enacted s. 30(3) of the Act which requires the Industrial Court to make its Award without delay and where practicable within 30 days. But here the claimant has been without a job for seven years, and the object and spirit of the Act to have industrial disputes speedily resolved in the national interests have been defeated and frustrated.
>
> Lord Morris of Borth-y-Gest in *Conway v. Rimmer* [1968] AC 910 held that:

> ... though precedent is an indispensable foundation upon which to decide what is the law, there may be times when a departure from precedent is in the interests of justice and the proper development of the law.

The courts, therefore, should not be obliged to continue to arrive at decisions which are both unjust to the citizens and inimical to the public well-being simply because of something decided centuries ago.

And on p. 239, Edgar Joseph Jr. FCJ (as he then was) said:

For myself, I believe that our view on the powers of the court in Judicial Review proceedings, although they constitute a departure from previous cases decided in this country to which I have referred, is a progressive one, and in giving effect to them we derive comfort from the famous words of Denning LJ (as he then was) in his dissenting judgment in the case of *Candler v. Crane, Christmas & Co.* [1951] 2 KB 164, regarded by lawyers, almost without exception, as a brilliant advancement of the law of negligent misstatement, vindicated triumphantly some twenty years later in the House of Lords in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465:

> This argument about the novelty of the action does not appeal to me in the least. It has been put forward in all the great cases which have been milestones of progress, and it has always, or nearly always, been rejected. If you read the great cases of *Ashby v. White, Parsely v. Freeman* and *Donoghue v. Stevenson* you will find that in each of them the judges were divided in opinion. On the one side there were the timorous souls who were fearful of allowing a new cause of action. **On the other side there were the bold spirits who were ready to follow it if justice so required.** It was fortunate for the conmon law that the progressive view prevailed. (emphasis added)

The words of Lord Denning, although uttered in a different context, can in appropriate circumstances, serve as a guide, to a judge when an argument of novelty is put forward, as happened in the present case.

I am of the opinion that due to the present climate of industrial relations and economic growth in Malaysia this would be an appropriate occasion to consciously depart from the Indian case of *Express Newspapers (P) Ltd.* which produced the offending principle decided almost 37 years ago on the ground that the needs of society and social conditions obtainable here in Malaysia are totally different than that of India then. Moreover, s. 3 of the Civil Law Act 1956 provides that the common Law of England and rules of equity shall be applied only so far as circumstances of the states of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary. In the Court of Appeal case of *Tengku Abdullah Ibni Sultan Abu Bakar & Ors. v. Mohd Latiff bin Shah Mohd. & Ors and Other Appeals* [1996] 2 MLJ 265 at pp. 309-310 Gopal Sri Ram JCA said:

> In our judgment, it would be quite wrong, and indeed wholly out of place, to decide a Malaysian case *solely* by refence to English or other Commonwealth decisions. Indeed, the more recent decisions of the English courts demonstrate that their concept of the doctrine and the relationships to which it may be extended do not accord to the standards of our society.
>
> ...
>
> The views expressed in *O'Brien's* case merely reflect the law's attempt to keep in tandem with the moral standards of the society in which an English court functions. Our society, on the other hand, has an entirely different set of moral standards. It would therefore be quite wrong to blindly follow all foreign decisions if the result would facilitate moral decadence within our social structure.
>
> ...
>
> The right to modify principles of the common law and doctrines of equity that have their historical origins in England to suit domestic needs of another jurisdiction has been very recently recognized by the judicial committee of the Privy Council in *Invercargill City Council v. Hamlin,* Privy Council Appeal No. 36 of 1995, yet unreported. It is an appeal from New Zealand. Speaking in quite a different context, Lord Lloyd of Berwick, when delivering the advice of the board, said:
>
> > But in the present case the judges in the New Zealand Court of Appeal were consciously departing from English case law on the ground that conditions in New Zealand are different. Were they entitled to do so? The answer must surely be 'yes'. The ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root, is not a weakness, but one of its great strengths. Were it not so, the common law would not have flourished as it has, with all the common law countries learning from each other.

In conclusion I am of the view that there is a need today in Malaysia for the court to adopt a proactive stand in order to create a win-win situation for both employers and employees. The employers and the employees are the pillars of the country's economic and social developments. I think I am fortified by the following statements made by Mr. Justice G.H. Walters, Supreme Court of South Australia in a paper entitled *"Archaism in the Courts"*, (see November 1977 MLJ p. lxxiv):

> Adherence to precedent is one of the fundamental conceptions of our legal system. Not infrequently, the first question a judge will ask himself when confronted with a case, especially in the field of civil law, is whether there is any previous decision capable of serving as a precedent, or, at least, an analogue for the case in hand. In this process, the judge searches for a

major premise to govern the case before him; he may use all sorts of comparisons, analogues or distinctions in guiding him in the determination of the issues falling for decision. This exercise will no doubt be undertaken in the quest for certitude; and no less an authority than Viscount Simonds stressed "the importance, ... The paramount importance of certainty of the law" (*Jacobs v. London County Council* [1950] AC 361, 373)). But if I may respectfully say so, a stringent adherence to the doctrine of precedent, to innumerable earlier judicial utterances, tends to place less importance upon basic principle and to make the judge something of a legal historian, rather than a theoretical jurist expanding deductive legal principles consonant with the changes that fit existing social and economic circumstances and meet new situations. "The more precedents there are, the less occasion is there for the law; that is to say, the less occasion is there for investigating principles:

(Boswell, *The Life of Samuel Johnson*, 1906 vol. 1, p. 416, cited by Lord Devlin, *op. cit*., at p. 6).

...

As I see it, the dominant purpose of all precedents must be to subserve in the construction, enunciation, and application of legal principles. Even a searching analysis of precedents cannot always be an illumination for the future. If judges' decisions are made to depend upon cases decided in their own or other jurisdictions, may we not find ourselves landed in the situation of having "a heap of unrelated instances which those come after may or may not find to be consistent with one another" (Sir Frederick Pollock, *Judicial Caution and Valour* [1929] 45 LQR 293, 296)). I ask, therefore, whether the stage has not been reached where judges "sacrifice their sense of reason and justice upon the altar of the Golden Calf of precedent" (*Van Kleeck v. Ramer* ([1916] 156 Pac. 1108, per Scott J. at p. 1121); where, by application of our system of case law to the formulation of law acceptable to modern society, we make a lesser contribution to legal thinking and bind ourselves too rigidly to the fetters of the past.

But if the answer to the question I have just posed be – nay, then no matter how time-honoured the concept of judicial precedent may be, it must not be blindly followed. Like all legal doctrines, it must be applied with an eye to justice. "The common law would be sapped of its life blood if *stare decisis* were to become a god instead of a guide" (*Fox v. Snow* ([1950] 76 A 2d.877, per Vanderbilt CJ at p. 883)). *Stare decisis* must not become a fetish, for slavish adherence to precedent, when new conditions require new rules of conduct, can only bring the administration of justice into disrepute. "Uniformity ceases to be good when it becomes uniformity of oppression" (Justice Cardozo: *The Nature of the Judicial Process* [1921] at p. 113).